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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

ABRAHAM FRANCIS, Petitioner

VERSUS

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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74-5808

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ABRAHAM FRANCIS,

Petitioner

VERSUS

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Abraham Francis, through counsel, moves the Court for leave to proceed in forma pauperis on his Petition for Writ of Certiorari, showing to the Court that he was represented in the United States District Court on his petition for writ of habeas corpus and in the Fifth Circuit on appeal, by undersigned counsel appointed under the provisions of the Criminal Justice Act, 18 U.S.C. §3006A et seq.

This motion is filed under Rule 53(1) of this Court, and pursuant to 18 U.S.C. §3006A(d)(6).

Respectfully submitted,

LOLIS E. ELIE
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C. MURRAY HENDERSON, Warden
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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner, Abraham Francis, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. That judgment reversed a district court decision, that had set aside petitioner's state conviction and sentence for felony murder.

OPINIONS BELOW

The opinion of the court of appeals is reported at 496 F. 2d 896 and appears at Appendix A, infra, pp. 7 - 13. The opinion of the district court is unreported and appears at Appendix B, infra, pp. 14 - 22.

JURISDICTION

The jurisdiction of this court to review by writ of certiorari the

judgment of the court of appeals is invoked under 28 U.S.C. §1254(1). The original opinion and judgment of the court of appeals were rendered on June 28, 1974. A timely application for rehearing and rehearing en banc was denied on October 7, 1974. 502 F.2d 1167. (Appendix C). This petition for certiorari is filed within 90 days of that date. 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. A state prisoner failed to raise, within the time limits set by a state procedural rule, an objection to the composition of the grand jury that indicted him. The question for decision is whether this failure is a bar to his raising the issue in a federal forum on habeas corpus.

2. If the failure to raise the issue timely is a bar, must the state prisoner's showing, in order to justify relief from the implied waiver, be one of "cause" or must he show "actual prejudice?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1 :

". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

Louisiana Revised Statutes, Title 15, Section 202 (repealed) :

"All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against an array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

STATEMENT OF THE CASE

Abraham Francis, a black man, was indicted for felony murder by the Orleans Parish Grand Jury on December 10, 1964. Francis was sixteen and indigent at the time. He was without counsel until February 9, 1965, when the state judge appointed for his defense an attorney who had not handled a criminal case for a number of years. Francis stood trial June 24, 1965; he was found guilty and given a life sentence Appointed counsel filed no motions in Francis' behalf until the day before the trial and did not perfect an appeal. No attack on the grand jury or general

venire was made.

On June 10, 1971, Francis filed pro se a petition for habeas corpus in state court alleging racial discrimination in the selection of the grand jury that had indicted him. A hearing was held and the state judge found that Francis' right to attack the grand jury had prescribed under Louisiana law; he did not reach the merits. The Louisiana Supreme Court denied the application for writs.

Francis filed federal habeas corpus March 3, 1972. On September 20, 1973, the district court ordered Francis' conviction and sentence set aside on the ground that the indicting grand jury was constitutionally defective. The state raised the argument that Davis v. United States, 411 U.S. 233 (1973), precluded Francis from attacking the grand jury. That argument was rejected and Davis distinguished. The court then went on to say that even if Davis controlled, it would still grant relief because Francis had shown "cause" sufficient to bring the case within the kind of exception envisioned by Federal Rule 12 (b)(2).

The state appealed to the Fifth Circuit, arguing that Davis required the federal courts to regard Louisiana's state procedural rule, LSA-R.S. 15:202 (repealed), as a bar to federal habeas relief. The court of appeals agreed; it held that the State's forfeiture rule must be strictly regarded. Since the Louisiana statute was absolute in its terms, however, and thus unlike Federal Rule 12 (b)(2), the court engrafted an exception onto the state law : if a federal petitioner could show "actual prejudice," he should be excused non-compliance with the state rule. The court flatly rejected the argument that where the petitioner was a state prisoner, the question of waiver was controlled by Fay v. Noia, 372 U.S. 391 (1963). Francis now seeks certiorari from the judgment of the Fifth Circuit.

REASONS FOR GRANTING WRIT

Abraham Francis' case presents, squarely and unavoidably, the question of whether the effectiveness of a purported waiver by a state prisoner is to be judged by the standards of Fay v. Noia, 372 U.S. 391 (1963) or by those of Davis v. United States, 411 U.S 233 (1973). This court is quite familiar with both cases, of course, and no purpose is served by rehashing their history. It should be noted,

however, that the Court in Davis said nothing about overruling Fay v. Noia. What it did was to reject the argument that Fay v. Noia controlled a situation where the petitioner was a federal prisoner. And for a sound reason : the federal prisoner, unlike a state prisoner, has already had a federal forum in which to assert federal constitutional rights.

Until this Court decided the Davis case, the Fifth Circuit had consistently decided waiver issues by following the standard of Fay v. Noia : a waiver under state law will not be given force absent a showing by the state of deliberate bypass or knowing waiver. Labat v. Bennett, 365 F 2d 698 (5th Cir. 1966) (en banc), cert. den., 386 U.S. 991 (1967), was the controlling precedent.

What the Fifth Circuit has apparently done is to conclude that Davis was meant to overrule Fay v. Noia and, by implication, Labat. In several terse per curiam opinions, Rivera v Wainwright, 488 F. 2d 275 (5th Cir. 1974); Marlin v. Florida, 489 F. 2d 702 (5th Cir. 1974); Jones v. Henderson, 494 F. 2d 47 (5th Cir. 1974), the Fifth Circuit has refused to follow Labat. It has instead chosen to test state waivers by the standard of Rule 12(b)(2). Now, in the instant case, it has gone even beyond Davis and has placed before Francis a barrier of showing not merely "cause" why he should be excused from strict compliance but that he was "actually prejudiced" by the admittedly unconstitutional grand jury. Francis, a state prisoner, is to be held to a standard more rigorous than that he would confront if he were a federal prisoner and had been in a federal forum all along.

There is another reason why this Court should hear Francis' case : the Fifth Circuit is in conflict with the Fourth Circuit. In Guzewicz v. Slayton, 366 F. Supp. 1402 (E D. Va. 1973) and Hairston v Cox, 361 F. Supp. 1180 (W.D. Va. 1973), two district courts have held that Fay v. Noia and McNeil v. North Carolina, 368 F. 2d 313 (4th Cir. 1966) are still the controlling precedents. Both courts rejected the argument that Davis had changed the ground rules for state prisoners. Hairston was affirmed by a three judge panel and then affirmed en banc. The en banc court, however, did not reach the merits. Still, the conflict is clear between the

circuits. Sound judicial administration, as well as simple justice, require that this Court, not Fourth and Fifth Circuit panels, decide whether Davis or Fay v. Noia standards are to govern questions of this type in the future.

CONCLUSION

A writ of certiorari should be granted to resolve uncertainty and to establish controlling principles.

Lolis E. Elie

LOLIS E. ELIE
Attorney for Petitioner

APPENDIX

Appendix A

John NEWMAN, Petitioner-Appellee,

v.

C. Murray HENDERSON, Warden, Louisiana State Penitentiary, Respondent-Appellant.

Abraham FRANCIS, Petitioner-Appellee,

v.

C. Murray HENDERSON, Warden, Louisiana State Penitentiary, Respondent-Appellant.

Nos. 73-3393, 73-3670.

United States Court of Appeals,
Fifth Circuit.

June 28, 1974.

Appeals were taken from the grants of Louisiana prisoners' petitions for writ of habeas corpus by the United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J. R. Heebe, Chief Judge, and James A. Comiskey, J. The appeals were consolidated. The Court of Appeals, Dyer, Circuit Judge, held that with respect to petitioner who had not shown prejudice Louisiana rule providing for waiver of challenges to jury not timely raised precluded considering his federal habeas corpus petition based on challenge to grand jury, but with respect to the other prisoner who had not had opportunity to show prejudice, his case would be remanded for opportunity to make such showing with respect to his grand jury challenge.

Grant of petition as to one prisoner vacated and case remanded with directions to dismiss petition and grant of petition to other prisoner vacated and case remanded for further proceedings.

Synopsis, Syllabi and Key Number Classification
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1. Habeas Corpus ⇐45.3(1)

Where Louisiana prisoner's claim of discrimination in composition of grand jury which returned indictment against him was rejected by Louisiana court, in proceeding after conviction, on ground that grand jury system prevailing at time of indictment had not been discriminatory, Louisiana rule providing that challenges to jury are deemed waived if not timely raised prior to trial precluded relief on his petition for federal habeas corpus based on claim of discrimination in composition of grand jury. LSA–C.Cr.P. art. 535; 28 U.S. C.A. § 2254.

2. Habeas Corpus ⇐45.3(1)

Louisiana rule, made absolute in form, providing that the challenges to selection of jury are deemed waived if not raised timely prior to trial must have an exception engrafted thereon to allow federal habeas corpus court to excuse noncompliance with statute procedural requirements when petitioner can demonstrate actual prejudice. LSA–C.Cr.P. art. 535; 28 U.S. C.A. § 2254.

3. Habeas Corpus ⇐113(13)

Where Louisiana prisoner, who unsuccessfully sought habeas corpus relief in Louisiana court which rejected prisoner's challenge to validity of grand jury selection procedures since he had failed to file objection within period specified by applicable Louisiana rule, had not had a chance to show prejudice, his petition for federal habeas corpus based on claim of improper selection procedure for grand jury which indicted him must be remanded and petitioner given an opportunity to make showing of prejudice which would preclude application of waiver rule. LSA–C.Cr.P. art. 535; 28 U.S.C.A. § 2254.

Appeals from the United States District Court for the Eastern District of Louisiana.

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Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

DYER, Circuit Judge:

These consolidated appeals raise the question of whether a state prisoner may challenge the validity of his indictment in a federal habeas corpus proceeding when a state rule of procedure prohibits the issue from being untimely raised in state court. We adhere to the principle that a district court cannot disregard the operation of a state waiver rule, absent a showing of actual prejudice by the habeas petitioner. Because the relief granted by the district courts did not comport with this waiver-by-failure-to-object principle, the district courts' writs must be vacated.

Newman was indicted by an Orleans Parish, Louisiana, grand jury in October, 1962 for aggravated rape and was convicted after a jury trial for that offense. Francis was indicted for felony murder by a grand jury in the same parish in December of 1964 and was subsequently found guilty by a jury of the offense charged. Thereafter both Newman and Francis unsuccessfully sought habeas relief in the Louisiana courts, alleging, *inter alia*, racial discrimination in the selection of their grand juries. Newman's petition was rejected on the ground that the grand jury system prevailing at the time of his indictment had not been discriminatory. In Francis' case, however, the state habeas court did not reach the merits of his contention, but held instead that Francis had waived the right to challenge the validity of the grand jury selection procedure since he had failed to file an objection within the period specified by the applicable Louisiana rule of criminal procedure.[1] It is undisputed that neither Newman nor Fran-

1. The rule then applicable was contained in LSA–R.S. 15:202:
> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall

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cis timely challenged their indictments on the basis of unconstitutionally constituted grand juries.

Failing to obtain relief in the Louisiana courts, the prisoners sought writs of habeas corpus in federal court pursuant to 28 U.S.C.A. § 2254. In each case the district courts concluded that the State had failed to show that the petitioners had deliberately by-passed state procedures and had failed to rebut the prima facie showing of discrimination in selecting grand juries. The district court which granted relief to Francis found alternatively that the petitioner had a "viable explanation" for his failure to file a timely challenge to the indictment. The court reasoned that if the matter had been presented by a *federal* prisoner seeking to avoid the waiver provision of F.R.Crim.P. 12(b)(2), the court would have found "cause" within the meaning of that Rule so as to justify relief.[2] The factual basis for the court's finding was that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition.

In appealing from the grant of federal habeas relief to Newman and Francis, Louisiana argues that the district courts erred by applying the "deliberate by-pass" test of Fay v. Noia, 1963, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, rather than the waiver-by-failure-to-object principle set forth in Davis v. United States, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216. In *Davis* the Supreme Court held that failure to raise an objection to the indictment prior to trial barred

be considered as waived and shall not afterwards be urged or heard.

The statute has since been repealed and replaced by LSA–C.Cr.P. art. 535.

2. F.R.Crim.P. 12(b)(2) provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

consideration of the alleged defect in the indictment in a collateral attack, unless the court found "cause shown" to excuse the operation of the express waiver provision. Although the *Davis* decision was rendered prior to the federal district courts' disposition of these cases, the record shows that the district judge in acting on Newman's petition did not consider *Davis* at all. The apparent reason for this omission is that the court relied on a magistrate's report prepared prior to the Supreme Court's opinion in *Davis*. On the other hand, the district court which granted Francis' petition considered the *Davis* holding, but accepted the distinction now urged by both Francis and Newman, that the decision concerned a federal prisoner and therefore has no application to a *state* prisoner seeking *federal* habeas relief.

This Circuit has already rejected the attempt to limit *Davis* to its precise facts. We recently affirmed the denial of a federal habeas petition challenging the selection of a Louisiana grand jury on the basis of the waiver provision contained in the present Louisiana rule.[3] Jones v. Henderson, 5 Cir. 1974, 494 F.2d 47. *See also* Marlin v. Florida, 5 Cir. 1974, 489 F.2d 702; Rivera v. Wainwright, 5 Cir. 1974, 488 F.2d 275.

[1] The record before us in Newman's case discloses nothing that would take his federal habeas claim outside the reach of *Davis* and our decision in Jones v. Henderson, *supra*. Therefore, we vacate the order of the district court and remand the case with directions to dismiss Newman's petition for habeas corpus.

Francis' petition, however, raises a more troublesome issue. Unlike the Florida waiver provision considered in *Rivera* and *Marlin*, *supra*, which is identical to Rule 12(b)(2), the Louisiana rule now before us purports to be absolute; that is, there is no "cause shown" exception comparable to the provision in the rules which we have previously considered.[4] The difference in

3. *See* note 1, *supra*.

4. The *Jones* opinion did not discuss the issue of whether non-compliance with the present Louisiana rule might be excused, although the

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procedural provisions requires an examination of the exception to the waiver-by-failure-to-object principle.

The Supreme Court in *Davis* accepted the district court's determination that there had been no "cause shown" to justify relief from the waiver provision of Rule 12(b)(2). The lower court's findings of fact persuaded the Supreme Court that Davis had not been prejudiced by the allegedly unconstitutional grand jury selection procedure. In recognition of the Rule's provision that a showing of prejudice overrides the interest of having an "airtight system of forfeitures," the Court stated:

> The presumption of prejudice which supports the existence of the right [as in Peters v. Kiff, 1972, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83] is not inconsistent with a holding that *actual prejudice* must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Davis, supra, at 245 (emphasis supplied).

[2] We believe that such an exception must be engrafted on the Louisiana statute to allow a federal habeas court to excuse noncompliance with state procedural requirements when the petitioner can demonstrate actual prejudice. The state's interest in requiring the timely filing of motions, especially motions which may abort a criminal prosecution, is indeed strong. But the countervailing concern was expressed by the Supreme Court in Fay v. Noia, *supra,* at 431: "Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such [a] procedure. But that state interest 'competes . . . against an ideal . . . [the] ideal of fair procedure.'"

By way of illustration, consider a hypothetical twist on the factual situation present in *Davis.* In that case, the petition-

Court did note that the petitioner had been represented by competent counsel. *Cf.* Tollett v. Henderson, 1973, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235.

er, a black, was indicted along with his two white accomplices. The case against him, the district court found, was a strong one, although largely circumstantial. Moreover, ample evidence was adduced to justify a grand jury's determination that Davis should stand trial. If, unlike *Davis,* however, an unconstitutionally selected grand jury had chosen not to indict the white participants but instead to indict only the black perpetrator, and if a collateral attack on the underlying conviction was made which seriously challenged the sufficiency of the evidence even to indict, a federal court would not be powerless to grant habeas relief. Fundamental fairness requires that a federal court be able to remedy such a wrong in spite of a procedural defect such as failing to file a timely objection to the indictment, assuming, of course, that noncompliance with the state rule was not merely a deliberate tactical maneuver.

[3] We conclude, therefore, that the Louisiana waiver provision must be given effect by the federal district courts unless there is a showing of actual prejudice. Consequently, the order of the district court granting Francis' habeas petition must be vacated, and the case remanded to permit a determination of whether the facts presented by Francis constitute a showing of prejudice which would excuse his non-compliance with the state's rule of criminal procedure.

Vacated and remanded with directions to dismiss with respect to Newman. Vacated and remanded for further proceedings consistent with this opinion with respect to Francis.

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Appendix B

MEMORANDUM OF REASONS (No. 72-719 "G")

(Title Omitted)

Filed: Sep. 20, 1973

When 17 years old the petitioner, represented by court appointed, uncompensated counsel, was convicted by jury of murder. On June 29, 1965, he was sentenced to life imprisonment. No direct appeal was taken.

In September of 1970, the petitioner requested a copy of his transcript for the purpose of perfecting an appeal. This request was refused. Petitioner filed a habeas petition in State trial court contending that: (1)

(1) he was deprived of his right to an appeal and access to his transcript; and (2) the grand jury which indicted him was defective since negroes were systematically excluded from service.

The State court with regard to the first contention, held that the petitioner's failure to file the proper pre-trial motion was fatal to that contention. Moreover, the right to challenge the constitutionality of the grand jury had prescribed.

The petitioner's application for writs of certiorari and habeas corpus to the Supreme Court of Louisiana on these issues was denied. Therefore, it appears that the petitioner has exhausted his available state remedies with regard to these issues.

The question before this Court is twofold: (1) did the petitioner waive his right to an appeal; and (2) does systematic exclusion of negroes from the grand jury constitute grounds for habeas relief despite an apparent failure to timely raise the issue in state court.

Firstly, the State courts may have erred in holding that the petitioner waived his right to an appeal.

In a decision from this Circuit as early as 1938, the United States Supreme Court held that courts should indulge every reasonable presumption against the waiver of constitutional rights, Johnson v. Zerbst, 1938, 304 U. S. 458. It does not appear that any such indulgence was made with regard to this petitioner. This concept was reiterated in Fay v. Noia, 1963, 372 U.S. 391,

391, when the Supreme Court held that the petitioner had not waived his right to an appeal. At a 1971 evidentiary hearing there was conflicting testimony concerning the petitioner's waiver of his appeal, the implication being, however, that the waiver was made by the petitioner's court appointed attorneys over his objections.[1] Furthermore, the excerpt from the sentencing

[1] A. "We told him we wouldn't take an appeal and he told his family that he kept hollering for an appeal."
(Hearing transcript 25)
* * * *
Q. "The defendant wanted an appeal and you and Mr. Tureaud advised him against it?"
A. "Under the circumstances, yes."
Q. "How old was he at the time, if you recall?"
A. "He was seventeen the day of the trial. He was sixteen when the act was supposed to have occurred."
(Hearing transcript 26)
* * * *
Q. "Did the defendant still persist that he wanted to appeal?
A. "Well, I think his parents imposed it upon him. He was a minor at the time and they followed our advice. Francis is a man but he was a terrified, young seventeen year old. I think that after a length of time he just sat there."
Q. "Do you know if the Court informed him upon sentence that he had a right to appeal?"
A. "The Court didn't inform him about anything."
(Hearing transcript 28)
* * * *
Q. "Did you and Mr. Tureaud in fact advise the defendant he had a right to appeal in this case?"
A. "After all of that kind of noise being made we told him he had a right to appeal. We didn't say any of those words, you can go up higher. It is best that you take this sentence, the jury saved your life and that's it. All of this about you have

proceedings indicates that the sentencing court failed to determine whether or not petitioner's waiver was an "intentional relinquishment of a known right or privilege," as was required at the time per *Fay* and *Johnson*, both supra.[2]

Secondly, although the petitioner is precluded from raising the issue of the constitutionality of the grand jury which indicted him in state court because of procedural impediments, he is not so estopped in this Court. Louisiana State law requires that objection be made "before the third judicial day of the term of which said jury shall have been drawn, or before en-

a right to appeal, we don't do it, nobody else was doing it that day. . . ."
(Hearing transcript 29)
* * * *
Q. "You were negotiating a plea bargain at that time?"
A. "I don't know what you call it."
Q. "What would you call it?"
A. "I don't know."
Q. "I am asking you what you would call it."
A. "We were doing the best at that time for our client."
Q. "That's bargaining?"
A. "I don't know, a deal I guess you would call it."
(Hearing transcript 41)
Later the chief prosecutor was asked whether he engaged in any type of bargaining and he answered:
A. "No, Mr. Winsberg, I don't for this reason. I could have really cared less. . . ."
(Hearing transcript 84)

[2] The determination by the trial judge as to whether the petitioner's waiver was an intentional relinquishment of a known privilege was merely the question:
A. "Does this defendant state at this time he does not intend to take an appeal?"
and the answer:
A. "I am not."

tering upon the trial of the case if it began sooner."[3] Obviously, the petitioner cannot now challenge his grand jury in state court. However, barring some intentional relinquishing or abandonment, there has been no waiver as far as the federal courts are concerned. *Hamilton v. Watkins*, 5th Cir. 1970, 436 F.2d 1323. See also *Fay v. Noia*, supra; *Johnson v. Zerbst*, supra; and *Labat v. Bennett*, 5th Cir. 1966, 365 F.2d 698. This trilogy of cases involves the precise question of waiver and all hold that there must be an intentional relinquishment of a known right or privilege, an element not apparently here.[4] It is also noted that with the exception of *Labat* all of these cases preceded the petitioner's trial.

For the above stated reasons, therefore, it is this Court's determination that the petitioner did not waive his right to an appeal. This question, however, appears moot since this court finds his indicting grand jury constitutionally defective. Although, according to state law, he may have waived his right to contest the constitutionality of his grand jury in state court, he has not so waived the right to raise the same question in federal court. Petitioner's failure to comply with state procedural rules bars consideration on the merits in any state forum as a matter of state law. Since, how-

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[3]LSA-R.S. 15:202.

[4]In *Fay* the waiver pertained to the right to appeal, in *Johnson* it pertained to counsel, and in *Labat* it was pertaining to a challenge of the jury system. * It is noted that although the petitioner was represented by counsel, his chief counsel had not been associated with criminal cases for many years. Moreover, he was in failing health at the time. As in *Labat*, this may explain the failure to timely raise this issue.

ever, a federal question is involved, whether petitioner's due process and equal protection rights were violated by the systematic exclusion of negroes from his grand jury, there is no bar to determination of this question in a federal habeas corpus proceeding. See *Noia*, *Labat*, and *Hamilton*, all supra. Moreover, *Labat* mandates such action.

It is noted that the State argues that the recent U.S. Supreme Court case, *Davis v. United States*, 1973, 93 S.Ct. 1577, precludes the petitioner from now challenging the validity of his grand jury by way of habeas corpus.

In *Davis* the Supreme Court, in a federal criminal case, held that the standards applied in habeas corpus should be no less lenient than those in the proceeding itself. Mr. Justice Rehnquist, however, also held in his majority opinion that "We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that rule may not later be resurrected, either in the criminal proceedings or in federal habeas in the absence of the showing of "cause" which that rule requires."

The situation in this case differs greatly from the situation in *Davis* and for this reason this Court cannot apply the *Davis* rationale.

Firstly, as was previously discussed, this Court fails to find that there was a waiver.

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Secondly, assuming arguendo, that mere failure to raise the issue, as per the rules of procedure, constituted waiver this Court would find "cause" which would justify relief. In Davis, the " 'Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury.' " In the case at bar the petitioner has a viable explanation.*

Thirdly, as Judge Christenberry held in *U. S. ex rel Bruce Barksdale v. C. Murray Henderson*, E D. La. 1973, CA 71-2411, *Davis* should be read with *Tollett v. Henderson*, 1973, 93 S.Ct. 1602. The *Tollett* Court held that the issue of whether grand jury exclusion might be raised on federal habeas after a plea of not guilty and trial by jury is an open question. Accordingly, Judge Christenberry held "In the absence of further elucidation on this question from the Supreme Court, the law in this Circuit remains that a state prisoner is not precluded from raising the issue of racial exclusion by way of habeas corpus. See e.g., Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966)."

It is apparent, from the information and statistics provided by the Magistrate's report, that the conclusion that the grand jury was defective is inescapable. The same practices condemned in *Labat* were extant at the time of the petitioner's indictment.* In *Labat* the Court said:

*See the Criminal District Court's order denying habeas relief. Trial record p. 3

"We find this explanation unacceptable. (A) The exclusion of daily wage earners as a class violates the petitioner's due process and equal protection rights to an impartial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 per cent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes. (C) Contrary to the district court's holding there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners as a class."

Accordingly, this Court is forced to order the conviction of the defendant set aside and to require the State to re-indict and retry the defendant, assuming the State is so inclined. In the event the State does not proceed to re-try the defendant within 180 days, then petitioner's counsel should bring a motion before the Court asking for the defendant's full and final release from custody. The Court retains jurisdiction.

Sept. 20, 1973

*The practice referred to is that of excluding hourly wage earners which, in effect, limited the number of blacks in the pool of potential jurors. See Magistrate's Report p. 4.

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

Lolis Elie, Esq.
George M. Strickler, Esq.
Russell J. Schonekas, Esq.
G. Thos. Porteous, Jr., Esq.
Abraham Francis
C. Murray Henderson, Warden

ORDER (No. 72-719 "G")

(Title Omitted)

Filed: Sept. 20, 1973

Based on the Memorandum of Reasons filed herewith,

IT IS ORDERED that the application for a writ of habeas corpus by the petitioner Abraham Francis be, and the same is hereby, granted, but execution of the writ and release of the defendant is postponed affording the State of Louisiana 180 days from the date of this order within which to indict and try the defendant, failing which counsel for the petitioner should bring forth a motion for the full and final release of the petitioner Abraham Francis.

September 20, 1973.

/s/ JAMES A. COMISKEY
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

October 7, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3670 FRANCIS V. HENDERSON

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Gene G. Parent
Deputy Clerk

cc: Mr. Shirley G. Wimberly, Jr.
Ms. Louise Korns
Ms. Barbara Rutledge
Ms. Lolis Elie
Mr. George M. Strickler

BEST COPY AVAILABLE